No. 88-372

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SAMUEL LEWIS, ET AL.,

Petitioners,

vs.

STEVEN ALLEN BRUNI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether a federal habeas corpus court may adjudicate a state prisoner's constitutional claims when the state courts have addressed both procedural default and the merits of those claims.

2. Whether this Court may grant a petition for a writ of certiorari to review a lower court judgment in favor of the petitioner, when the losing party has not yet filed a cross-petition for a writ of certiorari.

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STATEMENT OF THE CASE

The respondent, Steven Allen Bruni, was convicted in an Arizona trial court of several counts of kidnapping, sexual assault, and aggravated assault. Prior to his trial, Mr. Bruni moved to suppress, on Fifth Amendment grounds, certain statements he had made to police officers following his arrest. That motion was denied, and the statements were introduced against Mr. Bruni at trial. (Pet. at 5).

Mr. Bruni did not challenge the admissibility of his statements on direct appeal. However, in a subsequent post-conviction proceeding in the state trial court, Mr. Bruni claimed that his statements had been admitted into evidence in violation of Edwards v. Arizona, 451 U.S. 477 (1981), which had been decided while his direct appeal was pending. The state trial court summarily denied relief. The Arizona Court of Appeals affirmed this ruling, on the following grounds:

> [A]ppellant's claim regarding the voluntariness of his statements was explored in pretrial motions but not raised on appeal and therefore is deemed waived. . . . In any case, appellant was willing to talk and no constitutional violation occurred.

(Pet. at C-3). The Arizona Supreme Court denied review of the Arizona Court of Appeals' decision without opinion. (Pet. at D-1).[1]

Mr. Bruni then filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, raising the single claim that the state trial court's admission of his statements violated

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[1] Although the Court of Appeals used the term "voluntariness," it plainly was referring to the Edwards issue, since that was the only issue the respondent had raised with respect to the admission of his statements.

Miranda v. Arizona, 384 U.S. 436 (1966), and Edwards v. Arizona, supra. In the District Court, the petitioners argued (a) that review of Mr. Bruni's claim on the merits was precluded by a procedural default in the state courts, and (b) that Mr. Bruni's rights had not been violated. The District Court rejected the first of these arguments, but accepted the second. (App. A, infra). Mr. Bruni appealed this ruling to the Court of Appeals.

In the Court of Appeals, the petitioners re-asserted their argument that federal habeas corpus review of the merits of Mr. Bruni's constitutional claim was precluded by procedural default. Like the District Court, the Court of Appeals rejected this argument on the ground that the Arizona Court of Appeals had addressed the merits, citing Walker v. Endell, 828 F.2d 1378, 1382 (9th Cir. 1987), Huffman v. Ricketts, 750 F.2d 798, 800-801 (9th Cir. 1984), and Bradford v. Stone, 594 F.2d 1294, 1296, n. 2 (9th Cir. 1979). (Pet. at A-10). However, the Court of Appeals then held that Mr. Bruni's Fifth/Fourteenth Amendment rights had not been violated, and entered judgment for the petitioners. (Pet. at A-19). The Court of Appeals subsequently denied the petitioners' petition for rehearing. (Pet. at B-1). The petitioners now seek review of the Court of Appeals' procedural-default holding, notwithstanding the fact that its judgment was favorable to the petitioners.

Pursuant to Rule 22.1, this Brief in Opposition to Certiorari is being filed within 30 days of the date on which Respondent Bruni's counsel received the Petition for a Writ of Certiorari (August 24, 1988).

SUMMARY OF ARGUMENT

The Court of Appeals ruled in favor of the petitioners on the merits, and to date Respondent Bruni has not filed a petition or cross-petition for a writ of certiorari. Consequently, at this point in time the petitioners have presented no case or controversy that this Court may review. However, when Mr. Bruni files a cross-petition for a writ of certiorari, as he intends to do on or before October 5, 1988, this Court may grant both the cross-petition and the petition in order to review the merits of Mr. Bruni's challenge to his state-court conviction and the "procedural default" issue raised by the petitioners.

ARGUMENT

In the courts below, Respondent Bruni challenged his state court convictions on the ground that the state trial court improperly had admitted into evidence statements that had been obtained in violation of the respondent's Fifth and Fourteenth Amendment rights under Miranda v. Arizona, 384 U.S. 436 (1966), and Edwards v. Arizona, 451 U.S. 477 (1981). The petitioners opposed the granting of a writ of habeas corpus on two grounds: (1) that Mr. Bruni's constitutional rights had not been violated, and (2) that Mr. Bruni's alleged procedural default in the state courts precluded federal habeas corpus review under Smith v. Murray, 477 U.S. 527 (1986).

Like the District Court, the Court of Appeals rejected the petitioners' procedural-default argument because the state courts had adressed the merits of Mr. Bruni's constitutional claims. However, the Court of Appeals then ruled in the petitioners' favor on the merits. (Pet. at A-19). In the absence of a cross-petition for a writ of certiorari, the pending petition therefore does not present any case or controversy that this Court may review. Given the fact that the Court of Appeals entered judgment for the petitioners, any decision by this Court on the mooted procedural-default issue raised by the pending petition would be an advisory opinion. See, e.g., Perez v. Ledesma, 401 U.S. 82, 87, n. 5 (1971); Public Service Commission v. Brashear Lines, 306 U.S. 204, 206 (1939); Muskrat v. United States, 219 U.S. 346 (1911).

However, if and when Mr. Bruni files a timely cross-petition for a writ of certiorari seeking review of the Court of Appeals' decision on the merits, the procedural-default issue raised by the pending petition no longer will be moot. Mr. Bruni does intend to file a cross-petition on or before October 5, 1988, which is ninety days from the Court of Appeals' denial of rehearing. If this Court grants his cross-petition, Mr. Bruni does not oppose the simultaneous granting of the pending petition. While Mr. Bruni does not agree with the petitioners' assertion that the Court of Appeals' decision on the procedural-default issue was incorrect, or with the petitioners' analysis of the majority rule with respect to the availability of federal habeas corpus review when the state courts have adressed both procedural default and the merits (Pet. at 9-10), Mr. Bruni does agree that the Court of Appeals' approach to the procedural-default issue in this case conflicts with some decisions by other Circuit Courts of Appeals. See Harris v. Reed, 822 F.2d 684 (7th Cir. 1987), cert. granted, ___ U.S. ___, 108 S.Ct. 1107 (1988).

CONCLUSION

For the reasons stated above, Respondent Bruni respectfully requests that this Court withhold any decision on the pending petition for a writ of certiorari until this Court has received and considered a timely cross-petition.

RESEPCTFULLY SUBMITTED,

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APPENDIX A

(District Court Opinion)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

STEVEN ALLEN BRUNI,

Petitioner,

vs.

SAMUEL LEWIS, Director of Arizona Department of Corrections and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA, ROBERT CORBIN

Respondents.

No. CIV 87-270 TUC ACM

ORDER

Petitioner, Steven Allen Bruni, has petitioned this court for habeas corpus relief pursuant to 28 U.S.C. §2254.

FACTS

Petitioner was convicted by a jury of 14 counts of sexual assault, kidnapping, and aggravated assault (A.R.S. 13-1203(A)(1), (2), and (3), and (B), 13-1204(A)(1) and (2) and (B), 13-701, 13-702, 13-801, 13-803 and 13-604(B) and (D). Petitioner appealed. On May 4, 1981, the Court of Appeals affirmed the judgment and sentence, but remanded for resentencing on two counts. Petitioner was sentenced to consecutive and concurrent terms on the various counts resulting in a term to be served of 56 years. A motion for rehearing was denied. Petitioner filed a Petition for Review in the Arizona Supreme Court on June 18, 1981. The Supreme Court denied the petition on July 1, 1981.

Petitioner appealed to the Arizona Court of Appeals after resentencing. This appeal was stayed pending the outcome of a Petition for Post-Conviction Relief filed under Rule 32 of the Arizona Rules of Criminal Procedure. The Rule 32 Petition was denied on July 15, 1982. The appeal on the resentencing was consolidated with the appeal on the denial of Rule 32 relief. The Court of Appeals affirmed both the resentencing and the denial of the Rule 32 petition. A motion for rehearing was filed on this ruling, which was denied on October 19, 1983. Petitioner then filed a petition for review with the Arizona Supreme Court. This was denied on December 20, 1983. Petitioner filed his petition for writ of habeas corpus on May 5, 1987.

PETITION

Petitioner listed five grounds for relief in his petition:

1) Admission at trial of statements and other fruits of illegal interrogation occurring after petitioner invoked his right to counsel in violation of fifth and fourteenth amendments;
2) Infringement of right against self-incrimination;
3) Lack of jurisdiction in the court which rendered judgment;
4) Sentence imposed other than in accordance with proper sentencing procedures;
5) Due process violation when petitioner was tried in

absentia without a showing that he had voluntarily waived his right to be present at trial.

However, in the memorandum in support of the petition and in all subsequent pleadings, the single issue raised and argued is petitioner's denial of his right to counsel under Edwards v. Arizona 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Grounds 2 and 3 are resolved by the court's decision as to ground 1.

Regarding ground 5, the court has reviewed the trial court's discussion of petitioner's absence at his trial, wherein it was indicated that petitioner's wife made defense counsel to understand petitioner's whereabouts were unknown, that petitioner had gotten notice of his trial date at a previous hearing; and that petitioner was absent as a result of his own conscious choice. (R.T. of August 27, 1980, Respondent's Exhibit 14 to Answer to Petition). The court finds petitioner was not denied due process.

Regarding ground 4, other than the conclusory listing of this claim, petitioner has failed to make any showing of an improper sentencing. The court's review of the trial court sentencing proceedings fails to disclose any impropriety.

PROCEDURAL DEFAULT

A state prisoner seeking federal habeas corpus relief must exhaust all available state remedies. 28 U.S.C. §2254(a). Respondents claim petitioner procedurally defaulted in that he

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did not challenge the voluntariness of his statements on direct appeal and that he has failed to show cause and prejudice and required under Engle v. Isaac 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A state court's failure to rest exclusively upon the procedural default permits the federal court in a habeas corpus petition to reach the merits raised in that petition. Bradford v. Stone 594 F.2d 1294, 1296, n.2 (9th Cir. 1979). In this case, the court of appeals did comment on the legality of the interrogation of petitioner and explicitly found that no constitutional violation occurred. State v. Bruni No. 2 CA-CR 2523-2, memorandum decision at 2, Dec. 21, 1983. See Respondent's Exhibit 10. Consideration of voluntariness by the Court of Appeals, notwithstanding the waiver, is sufficient to allow this court to reach the merits of petitioner's claim.

RIGHT TO COUNSEL

The Fifth Amendment rule announced in Edwards v. Arizona 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) has been held to apply retroactively to cases on direct review when Edwards was decided. Griffith v. Kentucky 107 S.Ct. 708, 715 (1987). Edwards is applicable to this case, then, since petitioner's conviction did not become final until after the Edwards decision was rendered.

The Court in Edwards held that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be

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established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. Edwards 101 S.Ct. at 1884-5. An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Id. The Court went on to make clear what its holding did not mean:

> "[W]e do not hold or imply that [the defendant] was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by [the defendant] prior to his having access to counsel."

Edwards at 1885.

In this case, petitioner claims police officers violated his constitutional rights by conducting an interrogation after he had invoked his right to counsel. The record indicates that on October 22, 1979, petitioner's car was stopped by Tucson Police Officer Gracie because of unusually loud muffler pipes. (R.T., August 12, 1980 at page 61. Having stopped the vehicle, the officer identified the vehicle as one suspected being involved in a number of sexual assault cases under investigation. The officer then notified his supervisor, who in turn notified the sex crimes officer, Detective Comstock. who appeared at the scene. R.T. August 12, 1980 at 66. Petitioner was identified as the suspect in several sexual assaults which

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had occurred two weeks prior to the stop. It was at this point that petitioner was place under arrest by Detective Comstock and was advised of his right to remain silent and his right to have an attorney present under Miranda v. Arizona. R.T. August 12, 1980 at 84:

Q: Did you then advise him of his Miranda rights?

A: Yes, I did.

Q: And how do you do that?

A: I read them verbatim from the Miranda rights card.

. . .

Q: At that time, did you ask Mr. Bruni any questions?

A: I asked him if he understood his rights, yes.

Q: And what did he say?

A: He said, "Yes."

Q: And what happened with Mr. Bruni then?

A: I asked him if he wanted to answer our questions regarding the incident?

Q: And what did he say?

A: He initially said, "Not without my attorney." And then he added immediately after that, "Well, ask your questions and I will answer those I see fit."

Q: Now, between the first statement and the second, did you say anything to him?

A: No.

Q: And did you start asking him any question at that point?

A: I asked him if that meant that he would be willing to answer the questions that he wanted to answer himself and he said, "Yes."

R.T. August 12, 1980 at 85-86. At this point petitioner was transported to the Pima County Attorney's office where petitioner was again advised of his rights and where a tape recorded statement was taken:

Q: When you started tape recording your conversation with Mr. Bruni did you give him his Miranda rights first?

A: I did.

. . .

Q: What did he indicate after you gave him his Miranda warnings?

A: He indicated that he had understood his rights. When I asked him if he would answer our questions, he indicated those that he felt good to answer or that he thought his attorney would probably advise him to answer.

. . .

Q: During the course of your tape recorded conversation with Mr. Bruni, did he ever tell you he wanted to stop talking to you?

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A: No, he did not.

Q: Did he ever indicate to you that he wanted to have a lawyer present before he discussed the matter with you any further?

A: No, he did not.

R.T., August 12, 1980 at 103-104.

The exchange as quoted above makes clear that a determination needs to be made as to whether the police appropriately resumed questioning defendant under the Edwards test. In addition, since the resumed questioning was clearly interrogation, the question then becomes whether a valid waiver of the right to counsel and the right to silence occurred. See Oregon v. Bradshaw 103 S.Ct. 2830, 2834 (1983) ("But even if a conversation taking place after the accused has 'expressed his desire to deal with the police only through counsel,' is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver. . .").

The standards to determine when a valid waiver is given were established in Johnson v. Zerbst 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938):

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver. . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background experience, and conduct of the accused."

Johnson 58 S.Ct. at 1027. Any possible waiver made by petitioner must be found to have been 1) voluntary and 2) knowingly and intelligently given. Edwards v. Arizona, supra at 1884.

The record shows that Bruni indicated his desire to have an attorney present by stating "Not without my attorney," and immediately following that, without any prompting by police, volunteered to answer those questions he saw fit to answer. Nothing was said by police after petitioner's reference to an attorney. Petitioner himself initiated communication with police. The court finds that this comports with the Edwards rule allowing police to resume interrogation and that petitioner's comment constituted a valid waiver of his fifth amendment rights to silence and the presence of counsel.

Petitioner argues that the Mr. Bruni's statements were, at a minimum, an equivocal request for counsel. The court disagrees. There is nothing ambiguous or equivocal about petitioner's stating "Not without my attorney." Nor is there any ambiguity about his change of mind, immediately following. Petitioner voluntarily agreed to answer questions.

Petitioner's comment to police in this case is certainly clearer than what was considered in Oregon v. Bradshaw. The defendant there asked police "Well, what is going to happen to me now." The Court evaluated this comment thusly:

"Although ambiguous, the respondent's question

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> in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. . . On these facts we believe that there was not a violation of the Edwards rule.

Bradshaw at 2835. The Court then affirmed the appellate court's finding that a valid waiver had occurred:

> "[T]he Oregon Court of Appeals 'found that the police made no threats, promises or inducements to talk, that defendant was properly advised of his rights and understood them and that within a short time after requesting an attorney he changed his mind without any impropriety on the part of police.

Id.

The court finds that this case presents an even stronger case than Bradshaw. Petitioner was advised of his rights no less than twice. He indicated both times he understood these rights. There is no evidence on the record that petitioner was suffering from any mental incapacity at the time of questioning; nor did he show signs of intoxication. His comment immediately following his reference to an attorney explicitly and clearly indicated he had voluntarily agreed to answer questions. The statement makes no equivocal reference to petitioner's desire for an attorney and this distinguishes this case from those cited by petitioner. (See Nash v. Estelle 597 F.2d 513, 517 (5th Cir. 1979); United States v. Fouche 776 F.2d 1398, 1405 (9th Cir. 1985); United States v. Prestigiacomo 504 F.Supp 681, 683 (E.D. N.Y. 1981).

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For these reasons,

IT IS ORDERED the petition is denied. Petitioner's writ for habeas corpus relief is dismissed with prejudice.

Dated this 26th day of October, 1987.

ALFREDO C. MARQUEZ
United States District Judge

Copies mailed this date to:

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Certificate of Service

The undersigned hereby certifies that on the 23d day of September, 1988, he mailed one copy of the foregoing document, with first-class postage pre-paid, to counsel for the petitioners:

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All parties required to be served have been served.

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